

**THE CARGILL DEFENDANTS'  
RESPONSE AND NON-OPPOSITION  
TO PLAINTIFFS' MOTION FOR  
LEAVE TO SUPPLEMENT SUMMARY  
JUDGMENT RECORD (DKT. 2452)**

As Plaintiffs well know, the documents at issue are summaries prepared by Cargill

attorneys as privileged work product. The information is not and never has been in the possession of Cargill or CTP. Counsel took the same grower information delivered to Plaintiffs, interviewed growers, consulted non-testifying experts, and prepared the charts in the course of this litigation *for strategy purposes*. Counsel then delivered this work product to retained consultants, one of whom, Dr. Tom Ginn, later became a testifying expert. (See generally Ex. A: Ehrich Aff.)

The Cargill Defendants' attorneys believed that work product in the hands of a consultant that was not used, considered, read, or even reviewed by that consultant for his task as an expert remained confidential work product under Rule 26(b)(4)(B). (See Resp. to Mot. Compel: Dkt. 2019.) On motion, Magistrate Judge Cleary disagreed and found the work product nature of the document was waived when the consultant became a testifying expert. (Dkt. 2128.) In keeping with this Court's July 20, 2009 Order denying the Cargill Defendants' objection (Dkt. 2356), all withheld materials were produced and Dr. Ginn was immediately offered for a second deposition (Ex. B: July 21, 2009 Ltr.), which occurred on August 7, 2009. It is only this attorney work product – created early in the litigation by and/or at the direction of counsel – that Plaintiffs now wave before the Court.

Instead of consulting Cargill, Plaintiffs brought a motion filled with false accusations and out-of-context quotations, all of which suggest that their true purpose was not to supplement the record but to try to impugn the Cargill Defendants and to distract the Court from the merits of the Defendants' summary judgment motions.<sup>1</sup>

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<sup>1</sup> Plaintiffs have now filed a motion seeking extreme sanctions against the Cargill Defendants parroting nearly verbatim the motion for leave. (Dkt. 2459.) The Cargill Defendants will press

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**A. The Cargill Defendants Did Nothing Wrong in Withholding Attorney Work Product.**

The information at issue reflects preliminary investigations by counsel conducted for the purpose of formulating defenses to the sweeping claims brought by the State. They necessarily reveal the thought processes and mental impressions of counsel, and by no means constitute a complete record of grower information. Rather, they are a unique subset of information that counsel chose to collect at that time from third party interviews, organized in charts created by counsel. In other words, they are pure attorney work product under the law of this Court. E.g., Lamar v. Williams Comms., LLC, Case No. 04-CV-847 (TCK/PJC), 2007 U.S. Dist. LEXIS 8585 (Feb. 6, 2007).

In objections to the discovery requests Plaintiffs cite in their Motion, CTP consistently put Plaintiffs on notice that per Rule 26(b)(4) it would not disclose materials from consulting experts. (See Ex. B to Pls.' Mot. at Gen. Objs.; Ex. C to Pls.' Mot. at Gen. Objs.; Ex. D to Pls.' Mot. at Gen. Objs.: Dkts. 2452-3 – 2452-5.) The clear intent of Rule 26(b)(4) and CTP's objection was to shield from disclosure privileged communications and attorney work product. Further, CTP consistently objected to producing any information that it did not maintain in the ordinary course of business, information that the State could readily access using its own efforts and resources. (See Ex. B to Pls.' Mot. at Resp. to Interrog. 6 & Gen. Objs.; Ex. C to Pls.' Mot. at Supp. Resp. to Interrog. 6 & Gen. Objs.; Ex. D to Pls.' Mot. at Resp. to Interrog. 1 (referencing prior responses) & Gen. Objs.) CTP directed Plaintiffs to seek from the independent contract growers themselves whatever information Plaintiffs wanted regarding litter use because the company did not generally keep such information. (See Ex. B to Pls.' Mot. at

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the State to withdraw its wholly inappropriate and unfounded sanctions request.

Resp. to Interrog. 6; Ex. C to Pls.' Mot. at Supp. Resp. to Interrog. 6.) In addition, CTP expressly objected to disclosure of documents protected as attorney work product in responding to Plaintiffs' March 17, 2009 discovery requests. (See Ex. D to Pls.' Mot. at Gen. Objs.); see also N.D. Okla. LCvR26.4 (privilege logs need not list "work product material created after commencement of the action"). Indeed, the exhibits to Plaintiffs' motion itself illustrate that counsel and the experts counsel hired acted with a good faith understanding that this information compiled for purposes of litigation was confidential attorney work product at the time it was created and distributed among counsel and their consultants. (See, e.g., Pls.' Exs. F & K: Dkts. 2452-7, 2452-12.)

Plaintiffs improperly try to blur the line between the companies and its counsel and experts in an effort to create the appearance of impropriety. The bottom line is that the Cargill Defendants through their counsel asserted good faith objections to privileged and protected materials, materials that they had a substantial justification to withhold. As soon as this Court determined that the Ginn consulting materials were no longer protected by privilege, the Cargill Defendants produced them. There exists here no conspiracy against the State.

**B. The State Had Scores of the Exact Same Sort of Information, But Plaintiffs and Their Experts Chose Not to Utilize It.**

The State greatly exaggerates the significance of the few new documents produced on July 27. As outlined below, Plaintiffs had reams of this information at their fingertips, but ignored it in favor of pursuing a generalized, watershed-wide case against the poultry industry. Thus, they have suffered no discernable prejudice as a result of this discovery dispute.

*First*, Plaintiffs themselves had control over **all** the growers' litter application information in the entire Oklahoma portion of the IRW. The State's own files are the best source of information about poultry growing operations. Poultry growers and certified litter applicators in

Oklahoma must register with ODAFF, which maintains files for each registered operation and applicator. These files contain very specific information relating to each grower's operation including the contracting integrator; the number of houses; capacity of houses, number of flocks per year; soil test phosphorus levels on growers' fields; records of growers' litter application; and whether the grower stored, sold, or gave his litter away. The State collected these documents and produced them with their Initial Disclosures in June 2006.<sup>2</sup> Indeed, the State's trial exhibit list contains, among other grower-specific items from its own files, 335 Nutrient Management Plan entries (including plan updates) and 306 grower file entries (including grower file updates).

*Second*, the Cargill Defendants produced in discovery **all** of their contract grower files from throughout the IRW – files that include all the information about contract growers that Cargill and CTP kept in the ordinary course of business (as opposed to select items gathered by their counsel in the course of and for purposes of this litigation). These files include inspection checklists, waste application annual reports, and any Nutrient (or Animal Waste) Management Plans on file (for instance, for the Cargill-owned breeder farms). (See, e.g., Ex. C chart detailing Cargill Defendants' productions of grower-specific information to Plaintiffs; Ex. D: breeder farm NMPs.) To be helpful, counsel for the Cargill Defendants even produced contract grower information in the form of detailed charts created specifically for Plaintiffs. (Ex. E: CARTP137602-604, CAR000001-02, CAR000003-04). The Cargill Defendants provided driving directions to each contract grower location (Ex. F: CARTP088178 – 219), and the contact information for current CTP growers (Ex G: CTP Rule 26(a)(1) disclosures). The Cargill

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<sup>2</sup> The State's initial disclosure production of ODAFF documents is found at OKDA0000001 – 21846. The files specific to Cargill-related growers are: Robert Schwabe OKDA0016237 – 359; Ernest Doyle OKDA0002994 – 3107; Gary Fisher OKDA00003942 – 4047; Greg Hurt OKDA00006302 – 6391; and Clyde Masters OKDA0010055 – 155.

Defendants spent significant resources ensuring that its production was as detailed and thorough as possible.

Indeed, the majority of the grower data included in the “Cargill Grower Summary” cited by Plaintiffs had already been produced in forms kept by the companies; the only information that was not produced was the work product information collected by counsel. For example, the Cargill Defendants produced numerous versions of a similar summary table that detailed available grower data regarding house count, bird type, bird count, and estimating the amount of litter produced per year. (See Ex. H: CARTP095366 – 70, CARTP121759 – 63, CARTP228370 – 71, CARTP230005, CARTP230694 – 97.) The State is well aware of these documents, as versions were used in the deposition of Cargill employee Tim Alsup and others. (E.g., Alsup Dep. at 149:25 – 154:7, 158:5 – 159:25; Dkt. No. 2079-3.) The Cargill Defendants also provided estimates of the total number of their birds in the IRW. (CTP Resp. Interrog. 1: Ex. I.) Moreover, other Defendants collected their growers’ NMPs / AWMPs in the ordinary course of business, and thus produced them to Plaintiffs in discovery.

Despite having this wealth of grower-specific information at their disposal, Plaintiffs elected not to use this information in framing their proof for the trial of this case. Instead, Plaintiffs chose to proceed on a watershed-wide theory of circumstantial causation against a conglomerate industry. In pursuing this IRW-wide approach, Plaintiffs have never attempted to track the actual movement of phosphates from the edge of any specific field where poultry litter has been applied to any stream in the IRW. (Fisher Dep. at 83:12 – 84:5; Dkt. 2085-3; see also Sullivan R. at 115; Dkt. 2204.) Plaintiffs’ primary causation expert, Dr. Bert Fisher, conceded that while he had “collected the data” to “track runoff from poultry litter from a particular site to a stream to the lake,” he never completed that analysis, nor had any other Plaintiffs’ expert.

(Fisher Dep. at 83:12 – 84:5; Dkt. 2085-3.) Plaintiffs have consistently attempted to depict the IRW as a homogenous region where all fields are identical and runoff of litter constituents is inevitable and must reach the surface waters of the IRW. Their theory turns on edge-of-field sample data and analysis, yet Plaintiffs took **no** edge-of-field samples from any of the 35 Cargill grower locations over the course of this entire litigation. (Dkt. 2085-3: Fisher Dep. at 82:8–83:11; Dkt. 2089-2: Olsen R. at 6-17; Dkt. 2092-1: Engel Dep. at 175:11–176:4, 185:23–187:3; Dkt. 2092-2: Harwood Dep. at 168:25-170:6; Dkt. 2089-1: Murphy R. at 19.) Dr. Engel’s entire modeling approach is based on this hypothesis, and he conceded that the location of individual fields where litter has been applied is not accounted for in his model. (Dkt. 2092-1: Engel Dep. at 456:21–457:16.)

Before this litigation was even filed, Plaintiffs had begun a factual investigation into the litter application practices of growers in the IRW, and set their expert case in motion. In particular, Plaintiffs hired 14 individuals (all but one of whom was a trained police detective) to investigate and observe poultry feeding operations (including those of CTP’s contract growers) and to document observations of activities relating to land application of litter. (See Walker Dec. ¶¶ 3, 6; Dkt. 2085-6.) Starting in April 2005, over the course of four years, the State’s investigators made extensive field observations of the Cargill contract-growers and recorded at least 49 unique observations of Cargill-related facilities. (Id. ¶¶ 3, 16.)

In the face of this, the State chose to subpoena documents and information from just one Cargill-related grower: Bob Schwabe. (See Ex. J: Subpoena.) Plaintiffs’ counsel then both informally interviewed (in July 2006) and later deposed Mr. Schwabe (in July 2007). (See Dkt. 2079-6: Schwabe Dep.) Plaintiffs similarly deposed a handful of various Defendants’ growers, both in Oklahoma and Arkansas. (See, e.g., Ex. K: Ark. Grower Dep.) In sum, the State had

ample opportunity to collect information directly from the growers – through interviews, subpoenas, and depositions – but declined to do so in favor of a broad theory of causation.

The work product materials produced on July 27 at most show that turkey litter was actually applied to the fields at some of the Cargill grower locations and elsewhere – information that is and always has been readily available in the State’s own agency records for Oklahoma, and information that is *inapposite* to Plaintiffs’ overall causation theory. Even if Plaintiffs had received this small amount of information earlier, Plaintiffs’ own modeling expert Dr. Engel concedes that he can draw no site-specific conclusions about any Defendant’s litter from his edge-of-field modeling efforts because his model cannot be used to draw site specific conclusions. (Engel Dep. at 456:21–457:16; Dkt. 2092-1.)

In contrast to Plaintiffs’ attenuated theory of general causation, the Cargill Defendants’ experts attempted to use the environmental data collected by the State to assess whether any specific effects from litter application could be tied to a specific Cargill location. (Davis Dep. at 104:24 – 108:2; 110:22 – 111:8; Dkt. 2207-2.) While Plaintiffs criticized Drs. Davis and Murphy for not considering whether litter was applied at each of the 35 Cargill grower locations (e.g., Dkts. 2064, 2247), neither did Plaintiffs’ experts perform such analyses where they had site-specific information readily available, such as from the Oklahoma agency records or the Cargill Arkansas breeder farm files. Dr. Davis looked for an effect in soil and surface water samples below Cargill locations and found none.

In short, Plaintiffs can claim no prejudice whatsoever relating to these work product materials.

### **CONCLUSION**

The Cargill Defendants acted above-board and in good faith throughout the discovery



process. Further, Plaintiffs have not suffered any actual prejudice here. Plaintiffs' motion is based on a series of false and misleading statements and is not well taken. Even so, the Cargill Defendants has no objection to the subject documents being considered by the Court on summary judgment. The Cargill Defendants look forward to focusing on the merits of the summary judgment motions against the State, instead of red herring complaints.

Date: August 12, 2009

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**CERTIFICATE OF SERVICE**

I certify that on the 12<sup>th</sup> day of August, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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